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LEGISLATIVE PRAYER, THE SUPREME COURT OF THE UNITED STATES AND TWO CONCEPTS OF RELIGIOUS LIBERTY: TOWN OF GREECE, NEW YORK V. GALLOWAY

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This paper briefly contrasts two concepts of religious liberty—the French concept of strict secularism and freedom *from* religion, and the United States’ concept of mutual tolerance and freedom *of* religion as reflected in a recent decision of the United States Supreme Court upholding officially-sanctioned prayers at meetings of local legislative councils, such as town boards or city councils. On May 5, 2014, the Supreme Court decided *Town of Greece, New York v. Galloway*. In a 5-4 decision, the Supreme Court held that the Establishment Clause must be interpreted in light of an unbroken history of legislative prayer, dating back over 200 years to the time of the First Congress. Thus, rather than apply a judge-made test requiring strict separation, the Supreme Court held that the original meaning of the Establishment Clause, as reflected by “a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change,” should govern its interpretation of the Establishment Clause. Therefore, even sectarian prayers, such as those offered in the name of Jesus or the Holy Spirit, are permissible invocations by legislative bodies so long as they do not coercively proselytize a favored religion, nor disparage a disfavored faith or belief. Moreover, so long as those offended by the prayer are not required to participate, they have no right to enjoin the prayer. The conclusion of this paper is that mutual tolerance and freedom *of* religion are a better response to religious pluralism than are strict secularism and a harsh system of religious censorship and freedom *from* religion.

Keywords: Establishment clause, Religious liberty, Legislative prayer, Secularism.

Introduction

In his dissenting opinion in *McCreary County v. American Civil Liberties Union of Kentucky*,¹ Justice Scalia told a story about where he was on September 11, 2001. His story dramatically explained the difference between the European ideal of freedom *from* religion and the American ideal of freedom *of* religion:

On September 11, 2001, I was attending in Rome, Italy, an international conference of judges and lawyers, principally from Europe and the United States. That night and the next morning virtually all of the participants watched, in their hotel rooms, the address to the Nation by the President of the United States concerning the murderous attacks upon the Twin Towers and the Pentagon, in which thousands of Americans had been killed. The address ended, as Presidential addresses

¹ 545 U.S. 844 (2005).

often do, with the prayer “God bless America.” The next afternoon I was approached by one of the judges from a European country, who, after extending his profound condolences for my country’s loss, sadly observed: “How I wish that the Head of State of my country, at a similar time of national tragedy and distress, could conclude his address ‘God bless [our country.]’ It is of course absolutely forbidden.”

That is one model of the relationship between church and state—a model spread across Europe by the armies of Napoleon, and reflected in the Constitution of France, which begins “France is [a] ... secular ... Republic.” France Const., Art. 1, in 7 *Constitutions of the Countries of the World*, p. 1 (G. Flanz ed. 2000). Religion is to be strictly excluded from the public forum. This is not, and never was, the model adopted by America.²

Indeed, in a recent article entitled “A Secular Manifesto for Europe,”³ Dr. Lorenzo Zucca, of Kings College London, warns that “the spectre of secularism” haunts Europe and identifies France as “a paradigm example” of what he calls negative secularism, a secularism defined by “opposition to religion” in the public domain.⁴ As Dr. Zucca explains, the French concept of secularism is so strong that it “takes offense if someone wears [her] own religious symbols while walking down the street.”⁵ As the New York Times recently reported, the French bans on veils and headscarves “rather than promoting a sense of secular inclusion, have encouraged rampant discrimination against Muslims in general and veiled women in particular.”⁶ The French model of strict secularism is an ideology advancing freedom *from* religion. That strong notion of French secularism is very different—much more than an ocean apart—from the American vision of freedom *of* religion.

Justice Scalia went on to describe the long and unbroken history in America of official prayer and recognition and acknowledgement of God and the many tender mercies He has bestowed upon our Nation. Indeed, Scalia’s examples dated back to President Washington’s decision, on April 30, 1789, to add the words “so help me God” to the Presidential Oath, and to the decision of the First Congress to enact “legislation providing for paid chaplains in the House and Senate.”⁷ His conclusion was that these decisions are part of the fabric of the constitutional culture of America and reflect the clear understanding of “[t]hose who wrote the Constitution...that morality was essential to the well-being of society and that encouragement of religion was the best way to foster morality.”⁸

The purpose of this article is to focus on a recent decision of the United States Supreme Court on the issue of legislative prayers, and to use that decision as a vehicle for explaining how the American model of religious liberty reflects the concept of freedom *of* religion as opposed to freedom *from* religion. The case in point is *Town of Greece, New York v. Galloway*, a case that concerned a Town’s practice of opening meetings of the Town Board with a brief prayer delivered by a local clergyman or volunteer chaplain.⁹

² *Id.* at 885-86 (Scalia, J., dissenting).

³ Lorenzo Zucca, *A Secular Manifesto for Europe* (March 5, 2015). Available at SSRN: <http://ssrn.com/abstract=2574165> or <http://dx.doi.org/10.2139/ssrn.2574165>.

⁴ *Id.* at 1-3.

⁵ *Id.* at 9. Zucca is obviously referring to the recent French law prohibiting in public places the wearing of veils or other items of clothing that conceal one’s face. This law, which took effect in 2011, prohibits Muslim women from wearing “the burqa in public spaces.” Patrick Weil, *Headscarf versus Burqa: Two French Bans with Different Meanings* in CONSTITUTIONAL SECULARISM IN AN AGE OF RELIGIOUS REVIVAL 195 (Susanna Mancini & Michel Rosenfeld eds. 2014). France also prohibits public school students from the “wearing of signs or clothing which conspicuously manifests students’ religious affiliations.” *Id.* This law requires devout Muslim school girls to choose between wearing headscarves mandated by their faith and a free public education. *Id.* at 196.

⁶ Suzanne Daley & Alissa J. Rubin, *French Muslims Say Veil Bans Give Cover to Bias*, N.Y. Times, May 27, 2015, at A1, A6. Indeed, the strict secularism in France is so bad “that some Frenchwomen who are committed to being fully veiled have become shut-ins, afraid to leave their homes.” *Id.* at A6.

⁷ *McCreary County v. American Civil Liberties Union of Kentucky*, 545 U.S. at 886.

⁸ *Id.* at 887.

⁹ 134 S. Ct. 1811 (2014).

From *Marsh v. Chambers* to *Town of Greece, New York v. Galloway*: An Unbroken History of Legislative Prayer

The *Town of Greece* case was decided in the shadows of one of the Supreme Court's landmark decisions, *Marsh v. Chambers*, a case in which the Court held that the Establishment Clause permits a state legislature's "practice of opening each legislative day with a prayer by a chaplain paid by the State."¹⁰ The decision in *Marsh* was based upon an "unambiguous and unbroken history of more than 200 years," dating back to the First Congress, which authorized legislative prayer and paid chaplains only three days after reaching final agreement on the language of the Establishment Clause.¹¹ The Supreme Court decisively stated the historical case supporting legislative prayer: "Clearly the men who wrote the First Amendment Religion Clauses did not view paid legislative chaplains and opening prayers as a violation of that Amendment."¹² Moreover, not only is legislative prayer permissible, but the Court made clear that "[t]he content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or disparage any other, faith or belief."¹³

Town of Greece was decided more than 30 years after *Marsh*, and it concerned the constitutionality of the Town Board's practice of inviting local clergy to offer an opening prayer or invocation at the Board's monthly meetings.¹⁴ The purpose of the prayer was "to place town board members in a solemn and deliberative frame of mind, invoke divine guidance in town affairs, and follow a tradition practiced by Congress and dozens of state legislatures."¹⁵ Although the guest chaplain policy was open to "a minister or layperson of any persuasion, including an atheist,"¹⁶ and although no one was ever denied an opportunity to serve as a guest chaplain or discriminated against on the basis of religious persuasion,¹⁷ from 1999 to 2007 all of the guest chaplains were from Christian denominations and many of the prayers were offered in the name of Jesus or "in a distinctly Christian idiom."¹⁸ However, after Susan Galloway complained about the exclusively "Christian themes pervad[ing] the prayers," the town made a good faith effort to invite volunteers from other faiths to serve as guest chaplains.¹⁹ As a result of these efforts to be more inclusive, opening prayers were delivered by a Jewish layperson, the chairman of a Baha'i temple, and even a Wiccan priestess who prayed in the name of "Athena and Apollo."²⁰

Galloway and another party brought suit against the town claiming that the policy violated the Establishment Clause, and a lower court held that the prayer policy was indeed unconstitutional because the "steady drumbeat"²¹ of explicitly Christian prayer "impermissibly affiliated the town with a single creed, Christianity."²² The Supreme Court of the United States, however, reversed the lower court and held that the town's practice was perfectly constitutional.²³

Although the Supreme Court's decision in *Town of Greece* was based upon a 5 to 4 vote of the Justices, the case was actually an easy one given the landmark precedent of *Marsh v. Chambers*. The Court held that its opinion in *Marsh* did not create a narrow exception to its Establishment Clause

¹⁰ 463 U.S. 783, 784 (1983).

¹¹ *Id.* at 788, 792. Indeed, the unbroken history of legislative prayer in the United States goes back even before the First Congress "to the first session of the Continental Congress in 1774." Brief for the United States as Amicus Curiae Supporting Petitioner at 2, *Town of Greece, New York v. Galloway*, 134 S. Ct. 1811 (2014).

¹² *Marsh v. Chambers*, 463 U.S. at 788.

¹³ *Id.* at 794-95.

¹⁴ *Town of Greece, New York v. Galloway*, 134 S. Ct. at 1816.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* 1817.

²⁰ *See id.*; *Galloway v. Town of Greece*, 681 F. 3d 20, 25 (2d Cir. 2012).

²¹ *Galloway v. Town of Greece*, 681 F. 3d 20, 32 (2d Cir. 2012)

²² *Id.* at 22.

²³ *Town of Greece, New York v. Galloway*, 134 S.Ct. at 1815.

jurisprudence, but rather stands for the principle that the Establishment Clause must always be interpreted in light of its “historical practices and understandings.”²⁴ Moreover, under *Marsh* “it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted.”²⁵ This is a very significant part of the Court’s reasoning, because it calls into question the continued validity of any Establishment Clause test or decision that fails to take account of the history and original understanding of the Clause.

The majority opinion in *Town of Greece* clearly demonstrates that the United States Constitution embodies the concept of freedom *of* religion as opposed to freedom *from* religion. The Supreme Court clearly rejected both of Galloway’s principle arguments, each of which was designed to advance freedom from religion. First, Galloway argued that the Establishment Clause required legislative prayers to be nonsectarian²⁶ and addressed only to a “generic God.”²⁷ Prayers addressed to Jesus, or Yahweh, or Athena would be unconstitutional under Galloway’s nonsectarian principle.²⁸ Second, she argued that “prayer conducted in the intimate setting of a town board meeting,”²⁹ where the public often actively participates in the work of the town board, is coercive because “the public may feel subtle pressure to participate in prayers that violate their beliefs in order to please the board members from whom they are about to seek a favorable ruling.”³⁰

Relying on *Marsh* rather than dictum in other decisions, the Supreme Court held that the Establishment Clause does not require generic or nonsectarian prayer.³¹ Indeed, as an article in the *Harvard Law Review* reports, “not only was mandating nonsectarian prayer not required, but requiring nonsectarian prayer was also itself prohibited.”³² The unbroken history of legislative prayer recognized in *Marsh* “permits chaplains to ask their own God for blessings of peace, justice, and freedom that find appreciation among people of all faiths.”³³

Indeed, as Justice Alito observed in his concurring opinion in *Town of Greece*, during the First Continental Congress in 1774, Samuel Adams viewed legislative prayer as a means of unifying delegates from different religious traditions.³⁴ Adams responded to those who opposed legislative prayer because those of different religious traditions “could not join in the same act of worship,”³⁵ by proclaiming that “he was no bigot, and could hear a prayer from a gentleman of piety and virtue, who was at the same time a friend to his country.”³⁶ Echoing the spirit of Samuel Adams, the majority opinion concluded, that “[s]o long as the town maintains a policy of nondiscrimination,”³⁷ legislative prayer is constitutional and the “content of the prayer is not of concern to judges.”³⁸

The *Town of Greece* majority opinion was also not persuaded by the argument that prayer at town board meetings “coerces participation by nonadherents.”³⁹ Although there was no actual coercion or intimidation of those wishing not to pray,⁴⁰ Respondents argued that some members of the public might

²⁴ *Id.* at 1819.

²⁵ *Id.*

²⁶ *Id.* at 1820 (“Respondents maintain that prayer must be nonsectarian, or not identifiable with any one religion.”)

²⁷ *Id.* at 1817.

²⁸ *Id.* at 1817, 1820.

²⁹ *Id.* at 1824.

³⁰ *Id.* at 1825.

³¹ *Id.* at 1821.

³² *Leading Cases: First Amendment – Establishment Clause—Legislative Prayer – Town of Greece v. Galloway*, 128 Harv. L. Rev. 191, 193 (2014).

³³ *Town of Greece, New York v. Galloway*, 134 S. Ct. at 1823.

³⁴ *Id.* at 1832–33.

³⁵ *Id.* at 1833.

³⁶ *Id.*

³⁷ *Id.* at 1824.

³⁸ *Id.* at 1821 (citing *Marsh*, 463 U.S. at 794 – 95).

³⁹ *Id.* at 1824.

⁴⁰ *Id.* at 1826.

feel “subtle pressure”⁴¹ to join in prayers in order to please town board members “who would be ruling on their petitions.”⁴² In the alternative, Respondents argued that they found the prayers offensive and this made them feel “excluded and disrespected.”⁴³ The Supreme Court rejected all of these arguments reasoning that “mature adults” should have the capacity to resist subtle pressure and to either leave “the meeting room during the prayer” or remain in the room and quietly decline to join in the prayer.⁴⁴ Moreover, in response to Respondents’ argument that sectarian prayers offended them and hurt their feelings, the Court essentially instructed them to grow up and get over it:

“Adults often encounter speech they find disagreeable; and an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views in a legislative forum, especially where, as here, any member of the public is welcome in turn to offer an invocation reflecting his or her own convictions.”⁴⁵

In other words, neither subtle pressure to participate nor hurt feelings will suffice to give mature adults a constitutional right to enjoin legislative prayer at town board meetings. Religious liberty under the Establishment Clause does not give dissenters a heckler’s veto over the practice or content of legislative prayers.⁴⁶ Or, as Justice Kennedy put it so clearly in *Town of Greece*, “[s]o long as the town maintains a policy of nondiscrimination,”⁴⁷ government does not “engage in impermissible coercion merely by exposing constituents to prayer they would rather not hear and in which they need not participate.”⁴⁸

Conclusion

The Supreme Court’s *Town of Greece* decision is significant for a number of reasons. First, it makes clear that legislative prayer need not be nonsectarian or addressed to a generic god or power to be permissible under the Establishment Clause. Rather, there is an unbroken history in the United States demonstrating that even sectarian legislative prayer has a “permissible ceremonial purpose,”⁴⁹ one that echoes the tolerant views of Samuel Adams in support of legislators uniting to briefly acknowledge our Nation’s “belief in a higher power, always with due respect for those who adhere to other beliefs.”⁵⁰

Second, the case makes clear that the Supreme Court’s decision in *Marsh* did not carve out a narrow exception from its Establishment Clause jurisprudence for legislative prayer. Instead, in *Town of Greece* the Court explicitly decreed that all Establishment Clause interpretations must be made in light of historical practices and original understandings.⁵¹ Thus, no judge-made test should ever take priority over the historical written Constitution.

Third, *Town of Greece* also makes clear that adults offended by religion in the public square are not thereby empowered with a heckler’s veto giving them the right to censor religious expression that may be

⁴¹ *Id.* at 1825.

⁴² *Id.* at 1826. The Court made clear that the record in the case was clear that “[i]n no instance did town leaders signal disfavor toward nonparticipants.” *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 1827.

⁴⁵ *Id.* at 1826.

⁴⁶ For a discussion of heckler’s vetoes and the Establishment Clause, see Richard F. Duncan, *Just Another Brick in the Wall: The Establishment Clause as a Heckler’s Veto*, 18 Texas Rev. of Law & Politics 255 (2014).

⁴⁷ *Town of Greece, New York v. Galloway*, 134 S. Ct. at 1824.

⁴⁸ *Id.* at 1827.

⁴⁹ *Id.* at 1828.

⁵⁰ *Id.* at 1827-28. In other words, “ceremonial prayers strive for the idea that people of many faiths may be united in a community of tolerance and devotion.” *Id.* at 1823.

⁵¹ See *supra* notes 24-25 and accompanying text.

meaningful to others in the community.⁵² Offense and hurt feelings do not equal coercion, and rather than censor religious expression in the public square, “[o]ur tradition assumes that adult citizens, firm in their own beliefs, can tolerate and perhaps appreciate a ceremonial prayer delivered by a person of a different faith.”⁵³

Finally, this landmark decision recognizes that mutual tolerance and freedom *of* religion are a better response to religious pluralism than are strict secularism and a harsh system of religious censorship and freedom *from* religion. In the United States, we should always emulate Samuel Adams and respect those who wish, without coercing participation by others, to briefly acknowledge God with a ceremonial prayer or passive display in the public square.

⁵² See *supra* notes 39-48 and accompanying text.

⁵³ *Town of Greece, New York v. Galloway*, 134 S.Ct. at 1823.